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419205—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 605

WALLACE GROVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1300–1306) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 23, 1941 (R. 1306–1307). The petition for a writ of certiorari was filed September 11, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the proof established a scheme to defraud within the purview of the mail fraud statute.

2. Whether, when the credibility of the accused as a witness is in issue, he may be asked on cross-examination if he availed of his privilege against self-incrimination before the grand jury.

STATUTE INVOLVED

The mail fraud statute (Sec. 215 of the Criminal Code; 18 U. S. C., Sec. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is

directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted (R. 17, 838–839) upon an indictment charging him, in fourteen counts, together with George S. Groves, Ernest B. Warriner, Philip De Ronde, and various corporations, with utilizing the United States mails in the execution of a scheme to defraud and, in the fifteenth count, with having conspired to that end (R. 21–41). A severance was granted as to Warriner and De Ronde, who had fled the country, and one of the corporations (R. 15, 43, 47). Petitioner was found guilty on thirteen of the fourteen substantive counts and on the conspiracy count, received an aggregate fine of $22,000 and a two-year sentence, and was placed on probation for five years upon the expiration of his imprisonment (R. 18). George Groves was found guilty on the same counts, was also fined $22,000, and was given eight months' imprisonment and placed on probation for five years on the same terms (R. 18). The corporate defendants which stood trial were each fined $1,000 (R. 19, 846). Petitioner and George Groves appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed

petitioner's conviction but reversed the conviction of George Groves (R. 1305–1306, 1307).

The indictment (R. 21–27) charged the defendants with devising a scheme by which Ernest Warriner, acting as the "agent, associate, alter ego, and front man" for petitioner, would obtain control of the General Investment Corporation, nereinafter called "G. I. C.", and fraudulently exploit this control to the profit of the defendants and to the loss of G. I. C. and its minority stockholders. Warriner was to be made president of G. I. C. but the interest of petitioner was to be kept secret. It was charged that the defendants schemed to defraud G. I. C. and its minority stockholders in three separate transactions: (1) The payment of a $250,000 commission to defendant De Ronde; (2) the division of a $150,000 fee paid to Cica-Bracht, an Argentine banking syndicate, and (3) the acquisition by petitioner of the G. I. C. preferred stock of one Devendorf and the sale thereof by petitioner to G. I. C. at a profit of approximately $300,000.

The evidence with respect to each of these transactions may be briefly summarized as follows:

1. *The De Ronde Commission.*—G. I. C. had in its portfolio a substantial amount of notes and debentures of a Buenos Aires subway company (Ex. 159, R. 1095–1099). The subway was managed by Clifford Billings, a G. I. C. employee who had virtually completed negotiations for the sale

of these securities to an Argentine counterpart of the Reconstruction Finance Corporation, herein denominated "Instituto" (R. 272–273). Nevertheless, petitioner caused Warriner to send De Ronde, a former associate of petitioner, to South America (R. 320, 340–341).

Pursuant to negotiations carried on by one Pinedo, at one time Minister of Finance of Argentina (R. 301), an option had already been given La Croze Brothers under which Instituto was to purchase the G. I. C. holdings (Exs. 84, 87, R. 891–985, 200–201), which option had been assigned to Cica-Bracht, a banking syndicate (Ex. 160a, R. 1140). On November 13, 1936, Instituto requested that G. I. C. grant an extension of the option (Ex. 108, R. 1005). Although De Ronde's reply was drawn with a view to creating the appearance that Instituto had proposed an entirely new arrangement, whereby the securities were to be purchased by the banking syndicate, it is apparent that the real purchaser was to be Instituto, as had been contemplated throughout, the banking syndicate being formed merely to provide Instituto with the necessary funds to finance the transaction (Ex. 108, R. 1012).

On the day following the extension of the La Croze option (Ex. 79, R. 991), Warriner cancelled G. I. C.'s contract with Billings whereby Billings was to receive $50,000 for the negotiations embodied in the La Croze option when successfully

concluded (Ex. 82, R. 979). Some weeks later Warriner represented to Garver, G. I. C.'s counsel, that he had entered into an agreement with De Ronde pursuant to which the latter was entitled to a $250,000 commission (R. 525–526) because the negotiations could not have been consummated but for De Ronde's efforts (Ex. 71, R. 928). On the basis of Warriner's representations Garver advised the G. I. C. board of directors that they were justified in paying De Ronde such a commission (R. 526).

The manner of payment of the commission is significant. On Warriner's suggestion a check was made payable to the National City Bank (Ex. 64, R. 890) which his secretary took to the bank and exchanged for a $100,000 cashier's check payable to Philip De Ronde, Ltd. (Ex. 109, R. 135) and 150 $1,000 bills. She placed the check and the bills on the desk in Warriner's office and left the room. No one was in the office other than Warriner and De Ronde (R. 202, 204). This was on the day following the directors' meeting authorizing the payment, and on the same day De Ronde purchased $25,000 of English sterling and $75,000 of Argentine pesos (R. 435; Ex. 156, R. 1093). There is nothing in the evidence to indicate that De Ronde retained the 150 $1,000 bills.

2. *Division of the Cica-Bracht Commission.*— Cica-Bracht, in their offer to finance the purchase of G. I. C. subway securities, requested a $250,000 commission (Ex. 99, R. 294). Warriner offered

$150,000 (Ex. 100, R. 994), which they accepted (Ex. 101, R. 995). Martin, an officer of Cica (R. 459), testified that before the deal was closed he and Mueller of Bracht and Co. discussed the commission with De Ronde, who promised to refer their proposal "to his principals in New York," and a few days later "told us that they accepted our suggestion, provided the commission shall be split between them and us" (R. 445). Without disclosure of the fee-splitting arrangement, the $150,000 was paid by G. I. C. to Cica-Bracht (R. 277–280).

3. *The Devendorf Stock Transaction.*—After Warriner, on petitioner's behalf, came into control of G. I. C., one Devendorf, Warriner's predecessor as president of G. I. C., was eager to dispose of his large block of preferred stock (R. 371–372). Warriner refused Devendorf's stock at a time when G. I. C. was faced with the problem of utilizing a large amount of cash received from the sale of its Argentine subway securities (Ex. 71, R. 922; Ex. 72, R. 958, 959), but introduced Devendorf to petitioner and suggested that petitioner consider purchasing Devendorf's stock (R. 374–375). Negotiations were thereafter carried on between petitioner and Devendorf, both of whom consulted with Warriner and kept him advised of the progress of the negotiations. The result was that petitioner agreed to purchase Devendorf's holdings and to pay $87.50 a share for his preferred stock (R. 375–376).

After this agreement was made Warriner professed surprise to Garver, G. I. C.'s counsel, at learning that petitioner was about to acquire Devendorf's stock (R. 531–532), and advised Garver that it was desirable to get petitioner out since he would want to participate in shaping G. I. C.'s policies and since petitioner had a bad reputation in financial circles (R. 532). After some pretended hesitancy (R. 533), petitioner agreed to sell his preferred stock to G. I. C. at $102 a share (R. 534–536).

The minutes of the directors' meeting approving the purchase do not reveal that Warriner in any way indicated his familiarity with the circumstances surrounding the acquisition by petitioner of Devendorf's stock (Ex. 71, R. 938–939).

The day following the directors' approval of the stock purchase, G. I. C. paid one of petitioner's corporations $102 a share for 20,731 shares of preferred stock (Ex. 61, R. 1002). Out of the proceeds this corporation, two days later, paid Devendorf $87.50 a share for his stock (Ex. 117, R. 1044). The result was that petitioner gained a profit of approximately $300,000 on the transaction without using or risking any of his own funds.

ARGUMENT

I

(*a*) Although the perpetration of three frauds on G. I. C. and its minority stockholders is charged in the indictment, petitioner confines his argument

to the Devendorf stock transaction. With respect to that transaction he argues here, as he did in the Circuit Court of Appeals, that all that was proved against him was a breach of fiduciary duty and that this is not within the purview of the mail-fraud statute, which denounces only common-law deceit. With respect to the two other fraudulent transactions, the De Ronde and Cica-Bracht commissions, petitioner here asserts only that it was not proved that these commissions were not earned or were appropriated by the defendants (Pet. 2). The Circuit Court of Appeals rejected these contentions (R. 1304–1305) and petitioner does not attempt to demonstrate here wherein the court was wrong in its decision. It is well settled that conviction may be predicated upon any fraud charged in the indictment. *Dilliard* v. *United States,* 101 F. (2d) 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Cowl* v. *United States,* 35 F. (2d) 794, 798 (C. C. A. 8); *Shreve* v. *United States,* 103 F. (2d) 796, certiorari denied, 308 U. S. 570; *Goldstein* v. *United States,* 63 F. (2d) 609 (C. C. A. 8). Accordingly, we do not see that petitioner successfully attacks the decision below even if he proves all that he argues with respect to the mail-fraud statute.

(*b*) Petitioner contends that the Circuit Court of Appeals unjustifiably enlarged the scope of the mail-fraud statute when it held (R. 1303) that, irrespective of affirmative misrepresentations, the

statute condemns the utilization by a corporate officer of information which he conceals from his board of directors for his own benefit and that of another and to the detriment of the corporation. It would seem unnecessary to discuss this contention at length since in several recent cases this Court has refused to grant petitions for writs of certiorari to review holdings that the statute denounces a scheme whereby one in a position of trust, public or private, derives a secret profit from his fiduciary relationship at the expense of those whom he is supposed to serve. *Buckner* v. *United States,* 108 F. (2d) 921, 926–927 (C. C. A. 2), certiorari denied, 309 U. S. 669; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied May 12, 1941, Nos. 910–913, last Term.[1] See also *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), now pending in this Court on petition for writ of certiorari (No. 169).[2]

(*c*) Whatever the answer to that question, it is academic here for, as the court below held (R. 1304), Warriner's failure to make known to his board of directors Devendorf's offer to sell his stock to G. I. C., the background of the acquisition of Devendorf's stock by petitioner, and his own function as intermediary between Devendorf and

[1] For a more exhaustive exposition of the controlling theory see pp. 14–16 of the Government's brief in opposition in the *Shushan* case.

[2] Such a scheme is clearly encompassed within the framework of the indictment (see R. 23–24).

petitioner, constituted misrepresentation or, as the petitioner styles it, common-law deceit. See the Government's brief in opposition in the *Shushan* case, p. 13.

(*d*) As the Circuit Court of Appeals further pointed out (R. 1303), it is quite clear that Warriner was guilty of affirmative misrepresentations. The misrepresentations made to Garver, G. I. C.'s counsel (*supra*, p. 8) were, of course, made for the purpose of being relayed by him to the Board, together with his approval of the transaction.[3]

II

Petitioner complains (Pet. 43–45) of questions asked him on cross-examination concerning his refusal to testify before the grand jury with respect to his connection with several foreign corporations and his claim there of privilege against incrimination. Petitioner had testified on direct examination about most of these corporations and the import of his testimony was that whatever connection he may have had with them was innocent (R. 569–570). In such a situation it was entirely proper for the Government on cross-examination to attack his credibility by contrasting his explanation at the trial with his refusal to testify

[3] The trial court did not exclude from the jury, as petitioner indicates (Pet. 40), affirmative misrepresentations. While it stated that a person "may act misrepresentations by concealing the truth," it also indicated that the statute embraced misrepresentations written and oral (R. 824).

and claim of privilege before the grand jury, since the validity of his defense depended in large part on the weight given his own testimony. The questions were not asked solely to show that petitioner had availed of his privilege against incrimination (Pet. 44), but because that claim of privilege illumined the explanation made by petitioner at the trial.

In any event, when petitioner took the stand at his trial, his immunity against self-incrimination ceased. *Raffel* v. *United States,* 271 U. S. 494, 499; *Buckner* v. *United States,* 108 F. (2d) 921, (C. C. A. 2), certiorari denied, 309 U. S. 669; *Tomlinson* v. *United States,* 93 F. (2d) 652 (App. D. C.), certiorari denied, 303 U. S. 646; *United States* v. *Mortimer,* 118 F. (2d) 266, 268 (C. C. A. 2), now pending on petition for writ of certiorari (No. 72); *Commonwealth* v. *Smith,* 163 Mass. 411, 430–433. As was said by Mr. Justice Stone in the *Raffel* case, 271 U. S. at 499:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial

or to any tribunal other than that in which the defendant preserves it by refusing to testify.

CONCLUSION

The case was correctly decided below and there is presented no question of general importance or any conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
KEITH BROWN,
W. MARVIN SMITH,
Attorneys.

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